In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
MRS. GUE LIM, AH TONG, YEE YUEN, and AH QUONG. } No. 123.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case arises under the Chinese exclusion laws, and comes before the court on appeal by the United States from the judgment of the district court of the United States for the district of Washington. The parties defendant were arrested as found unlawfully in the United States, Mrs. Gue Lim, because she was alleged to be a Chinese laborer without a certificate of registration as

such, and the other appellees because on other grounds they were held to be without legal authority to remain in the United States. It was afterwards agreed (Rec., p. 8) as to Gue Lim that she is a Chinese woman, the lawful wife of a Chinese merchant, one Fook Kee, engaged in business in the State of Washington within the statutory test of such character (act of November 3, 1893, sec. 2, 28 Stat., 7), and lawfully domiciled in the United States; that Gue Lim arrived at the port of Tacoma, Wash., from China, accompanied by her husband (who appears to have been returning to the United States after a temporary absence), it being, however, the woman's first arrival here; and that the collector of customs, acting under general instructions of the Treasury Department, allowed her to land in May, 1897, without producing the certificate provided for by section 6 of the act of July 5, 1884. Her arrest followed in October, 1897.

As to the other appellees, the agreed statement of facts shows (p. 14) that they were born in China of parents lawfully married, and had resided in that country up to the time they came to the United States to live with their respective fathers, and that they were minors of tender years; that the fathers were for a long time prior to the coming of the boys to this country *bona fide* Chinese merchants, lawfully residing and doing business in the State of Washington, who had sent for their sons to come from China to live with them, and the boys were residing with their fathers when arrested by the United States immigration officer, and had never procured any

certificate under section 6 of the act of 1884, relying upon the status of their fathers as merchants here to entitle them to come to this country, upon which claim they had been admitted by the collector of customs at Port Townsend.

It appears that the Government claim that Gue Lim was a Chinese laborer was abandoned, because the assignment of errors (pp. 9, 10) places error on the court below in holding that, in pursuance of the treaty with China of November 17, 1880 (22 Stat., 826, Art. II), the wives and minor children of Chinese merchants lawfully dwelling within the United States were not excluded from entering, although they did not produce the certificate required by section 6 of the act of July 5, 1884 (23 Stat., 115). The provision of said section is as follows:

> That in order to the faithful execution of the provisions of this act every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full; title or official rank, if any; the age, height, and all physical peculiarities; former and present occupation or profession, when and where and how long pursued, and place of residence of the

> person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.
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> If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid. * * *

It appears further that the defendants were taken before a United States commissioner for the district of Washington and adjudged to be Chinese laborers unlawfully within the United States, and were ordered to be deported to the Empire of China, and thereupon an appeal was taken to the United States district court, and the execution of the writ of deportation was suspended pending the same. (Rec., pp. 13, 16, 18.) After hearing, the district court held that Gue Lim is the wife of a Chinese merchant, lawfully domiciled and doing business as a merchant, and is not a laborer nor a person excluded by the laws of the United States from coming to or remaining in the United States, and she was therefore discharged from custody and the cause dismissed (pp. 2, 3). This result appears to have been accepted, *mutatis mutandis*, as applicable to the case of the boys; and thereupon the United States took an appeal to the Supreme Court of the United States as to all the parties defendant. The opinion of the court below will be found at pages 3–8 of the record.

Although it appears that all the applicants had been admitted by the collector, their subsequent arrest on the charge of being unlawfully within the country, in order

to determine their right to enter, was proper, because it is provided by the act of August 18, 1894 (28 Stat., 390), "that in every case where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury." As was said by Judge Lacombe in *In re Li Foon* (80 Fed. Rep., 881, 883):

> This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the Supreme Court in *United States* v. *Jung Ah Lung*, supra.

The contention of the applicants below was, and the opinion of the court is, that there was a right of entry secured to the wife and minor child of a Chinese merchant lawfully dwelling in the United States under the treaty of 1880 (22 Stat., 826), and that the applicants were not only entitled to enter this country, but entitled to enter without producing the certificate required of privileged Chinese persons by the sixth section of the act of July 5, 1884 (23 Stat., 115). The appeal, therefore, draws in question the construction of the treaty of 1880, and is therefore well taken direct to this court under section 5 of the circuit court of appeals act (26 Stat., 826), the fifth clause of the classification of which

section, of cases appealable directly to the Supreme Court, is: "In any case in which the constitutionality of any law of the United States, or the validity *or construction* of any treaty made under its authority, is drawn in question."

The point now to be determined as drawn from the record, regarding both the treaty of 1880 and the act of 1884 may therefore be stated as follows: May the valid wife and legitimate children of tender years of a Chinese merchant, duly domiciled and doing business in this country, enter the United States and remain there without producing upon their original arrival the certificate required by section 6 of the act of 1884?

ARGUMENT.

The United States at the outset disclaims any intention to contend against the fundamental and natural right (which, in the absence of provisions of law expressly denying this natural right perhaps exists, irrespective of any treaty), of the valid wife and legitimate minor children of Chinese merchants, not being in fact laborers, to come to and remain in this country whether they accompany the husband and father on his original entry, or follow him after he has secured a legal domicile here. But the United States does contend that such wife and children may not be permitted to enter originally without the production of the required certificate. The question of whether on reentry after a temporary absence a certificate would be necessary is not now involved. It may be that that case would be assimilated to the case of a returning merchant under the decision of the *Lau Ow Bew* case

(144 U. S., 47); that is, that the right of the merchant and the applicants' relation to him would operate to extend his status to them, or confer upon them similar domiciliary rights, and therefore that his wife and children, like himself, upon a reentry would not need to produce the certificate required by the act of 1884.

To begin with, let us examine the relation of the wife to the husband, and the extension to her of the status of the husband, in its more general aspect under the Chinese exclusion laws.

(*a*) *The relation of wife and children to a father.*

In the case of *Ah Moy* (21 Fed. Rep., 785), Judge Sawyer was of opinion that the Chinese exclusion acts applying to laborers as a class, the wife of a Chinese person has the same status as the husband and belongs to the class to which he belongs, whether she is in fact a laborer or not, and the husband being a laborer in that case, this operated to exclude the wife. The opinion of Mr. Justice Field in that case holds that a Chinese wife must be regarded as a distinct person, and that to be entitled to admission she must furnish a certificate as required either by section 4 or section 6 of the act of 1884. It may well be, however, in view of the plain purpose of the Chinese exclusion laws, that the rule would not work both ways; in other words, that the husband's status might be attributed to the woman if he were a laborer, so as to exclude her even if she were not herself a laborer, whether she produced a certificate showing that individually she was of the permitted class

or not, and, on the other hand, that if her husband was of the permitted class she would have to show that she was not a laborer in fact; and even if not so, would have to produce the required certificate even if her husband produced one on his original entry, or being domiciled here, did not require one upon reentry under the Lau Ow Bew decision, his wife coming for the first time and accompanying him on his return. The latter is the exact variation of the question now before the court.

In other words, a Chinese woman might be excluded because her husband was a laborer, but the permitted status of a husband as a merchant, while so far cast upon the wife as to entitle her to entry if she was not in fact a laborer, would not extend sufficiently to admit her on his certificate and without one of her own if she accompanied him on his original entry, or without any certificate if she followed him and came in alone on her own original entry.

The decision of the district court in the case before the court was based upon the decision of Judge Deady in the case *In re Chung Toy Ho* (42 Fed. Rep., 398), Judge Deady holding that the wife and minor child of a Chinese merchant lawfully dwelling within the United States are not of the laboring class and therefore are not excluded from entry, and that it is impracticable for such persons to comply with the certificate requirements of the law, and if those requirements are held to be applicable to them, they must necessarily be deprived of rights guaranteed by the treaty of 1880, which recognized the inherent rights based upon the family relation.

(*b*) *The treaties and statute.*

Examining the law involved in the question, Article II of the treaty of 1880 is in the following language:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants * * * shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

At this point it may be observed that in the court below it appears to have been contended that since the treaty allowed Chinese merchants to bring into the United States their body and household servants, they were entitled to have their wives and children with them without compliance on the part of such wives and children with the acts of Congress; but this suggestion really begs the question. While the treaty stipulated for the presence of servants, no doubt in view of the fact that Chinese merchants or travelers could not be acceptably served in the United States except by their native servants, it must always be remembered that the provisions of the act of 1884, presently to be considered, followed the treaty of 1880 and was a later and fuller expression of the legislative will, and became a law, as the title of the act of 1882 which it amended shows, in order to carry into effect the treaty stipulations; and inasmuch as the servants of Chinese merchants, as well as their wives and children, were Chinese persons, and plainly covered by the phrase of the act "every Chinese person," there is no good ground

for the contention that Chinese merchants may bring either their servants or their wives and children without producing the certificate required by the act for each person accompanying them.

Section 6 of the act of July 5, 1884, in full, provides:

> That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.
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> If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise pre-

serving shell or other fish for home consumption or exportation.

If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired.

The certificate provided for in this act, and the identity of the person named therein, shall, before such person goes on board any vessel to proceed to the United States, be visćed by the indorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.

Such certificate visćed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

It seems to have escaped attention in the court below that the convention with China of December 8, 1894 (28 Stat., 1210), by which among other things the coming of Chinese laborers to the United States was absolutely prohibited for a further period of ten years from the date of the said treaty, provided by Article III that—

> The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government, or the Government where they last resided, viséed by the diplomatic or consular representative of the United States in the country or port whence they depart.

Here is the distinct admission by the Chinese Government that the immunities accorded to certain Chinese persons by the treaty of 1880 are so far modified that all the permitted Chinese subjects may produce the certificate for identification, and in view of the intervening laws of the United States requiring the certificate, it is obvious that "may" in this treaty is necessarily in practice to be read as "must."

We are unable to perceive in the record any reason for doubting that the rights of the applicants are dependent upon a construction of both treaties, and that the privileges supposed to be accorded to them under the treaty of 1880 are to be read in the light of the modification in the treaty of 1894, by which the necessity of a certificate is recognized as well as in the light of the intermediate statutes.

(c.) *Decisions of lower courts.*

The decisions on the point in the lower courts have been as follows:

In *In re Ah Quan* (21 Fed. Rep., 182), the United States circuit court for the district of California held that the language of the act of 1884 embraces every Chinese individual; that since the act does not say that every Chinese person except the wife or child of one having a certificate shall produce a certificate, the certificate required of returning Chinese can not entitle the wife or children of the holder to enter with him; there must be either an independent certificate for each, or else the certificate issued to the husband or father must contain also a certificate of the facts required both as to the wife and each minor child sought to be introduced.

Much stronger, surely, is the case where the wife and children do not accompany the husband and father, but follow him, as the children did in the present case. The court below, in the case at bar, seemed to see in the opinion in the *Ah Quan* case only a decision excusing Chinese laborers who were in the United States on November 17, 1880, and who departed from the United States prior to June 6, 1882, from producing the certificate required by section 4 of the original act, or who departed before July 5, 1884, from producing the certificate required by the act of that date; and thinks it is apparent that the court did not consider the case of the wife or minor child of a Chinese merchant duly domiciled in the United States previous to the coming of the wife or the child. But the language of the court as shown on pages 186 and 187 is broad enough to embrace the case

stated, and we contend necessarily embraces it, repeating that the requirement of a certificate where the wife or children do not accompany the husband is even more obviously essential than when they do.

In the case of the *Chinese Wife* (*In re Ah Moy*), id., 785, referred to *supra*, the woman was the wife of a Chinese laborer who resided in the United States November 17, 1880, and until September, 1883, when he made a visit to China and there married his wife and returned to the United States in September, 1884, bringing his wife with him. He produced on his return a certificate obtained before his departure from this country to enable him to return to the United States. The view of Justice Field was that his certificate gave him no authority to bring another person with him. "The fiction of the law as to the unity of the two spouses does not apply under the restriction act. As a distinct person she must be regarded, and therefore must furnish the certificate required either by section 4 or by section 6 of the act of 1884;" the contention of the United States in that case being that she partook of her husband's status of laborer and should therefore be required to furnish a laborer's certificate to establish her right to enter the United States. The learned justice, however, thought that the wife would not be deemed to follow the husband's calling any more than the wife of a lawyer, physician, or *merchant;* that she is therefore to be regarded as a person other than a laborer, and as such required to present the certificate provided by section 6 of the act of 1884, which "is made the only evidence permissible on the part of the person seeking to enter the United States." Justice Field's

opinion recognizes, as follows, the fundamental human relation, which is apparently present to the mind of the court in several of the decisions:

> We are not insensible to the earnest remarks of counsel as to the hardship of separating man and wife. With our notions of the sacredness of that relation, they appeal with striking force. But here the relation was voluntarily assumed in the face of the law forbidding her coming to the United States without the required certificate; and they need not now be separated. He can return with and protect his child-wife in the Celestial Empire.

The opinion of Justice Sawyer in that case excluded the woman because she took upon herself by her marriage the status of the husband as one of the class who are not now permitted to enter the United States without reference to her former status; and as she could not produce in the nature of the case the return certificate as the only evidence of a laborer's right to reenter the United States, and as there is no exception in any of the language of the act of the wives and minor children of Chinese laborers, the petitioner must be excluded; further, that, even if the wife of a Chinese laborer entitled to return and bring his family with him is fairly covered by the language of the treaty of 1880, yet the provisions of the act are inconsistent and in conflict with the treaty so construed, and the act, being later than the treaty, annuls or repeals it. Judge Sawyer also says, conceding for the sake of argument the separate character of the wife:

> But if a wife in the situation of the petitioner does not take the status of her husband, and if the re-

striction act as amended in 1884 is applicable to her case, then she has an individual personal right to enter the United States as not being a Chinese laborer, without regard to her husband; but in that case the certificate prescribed by section 6 is the only evidence upon which she can enter. The certificate she has not got, and the result is the same. I think the former the proper view.

The court below in the present case evidently is of opinion that the preexistent right of the domiciled merchant is to be fully attributed to his wife and children, and distinguishes the earlier cases on that ground. For instance, the court intimates this difference in reference to the *Ah Quan* case, where returning Chinese laborers and Chinese laborers entering for the first time are apparently both considered, and the latter particularly perhaps, with reference to the wife and children, although the facts are not clear. But in the case of the *Chinese Wife* the husband was returning, and no difference can be perceived between the case of a laborer who had acquired a domicile and was entitled to return upon production of the certificate in the form appropriate at the particular time and the case of a merchant who had acquired a domicile, except that it has now been held under the *Lau Ow Bew* case that a merchant upon reentry need not produce the certificate of the act of 1884. The right of the wife in the merchant case would not be different or greater than her right in the laborer case (at all events as the law was, if not as it is at present), and in either case we contend that she should produce a certificate if she accompanies her husband when she enters for the first time, and

perhaps with greater reason when she follows him, upon her own original entry. As before remarked, we are not at all concerned now with what her right might be upon her reentry if she had duly and legally obtained admission on her original entry.

The court below also, in commenting upon the case of *Wo Tai Li* (48 Fed. Rep., 668), says there is nothing in the report of that case to show that the husband was domiciled in this country, or that Judge Hoffman considered the question as to the right of Chinese persons not laborers having a domicile in the United States to bring their wives and minor children to dwell with them. Here, again, it may be said, although that case will be considered *infra*, that the language of the decision admits of no exception, nor, as has just been suggested, can any difference be perceived between the right of Chinese laborers who are duly domiciled here and have the right of return to bring their wives and minor children to dwell with them and the right of Chinese persons not laborers and of the permitted classes to do so, except that the latter class may reenter without a certificate under the *Law Ow Bew* decision.

In the case of *In re Chung Toy Ho et al.* (42 Fed. Rep., 398) the petitioners were the wife and child of a well-known Chinese merchant, resident for some years in Portland, Oreg., who visited China, and on his return brought the petitioners with him, they having never been in the United States. The merchant himself produced the certificate which was then supposed to be required of him, although he was reentering, but the petitioners had

no certificate. Judge Deady stated the decision himself in the syllabus, as follows:

> The wife and children of a Chinese merchant who is entitled under article II of the treaty of 1880 and section 6 of the act of 1884 to come within and dwell in the United States, are entitled to come into the country with him or after him as such wife and children without the certificate prescribed in said section 6.

The opinion of the court emphasizes the purpose of the Chinese legislation as the exclusion of Chinese laborers from coming or returning to the United States. "The other classes—'teacher, student, and merchant'—are not required to have certificates before they can be admitted into the country because their admission is intended to be restrained or limited, but to prevent laborers from being admitted in the guise or in the character of such classes." The court states that there is no limitation of the right of these classes to come within and dwell in the United States. The case of the petitioners is held not to be within the mischief that the exclusion act was intended to remedy, and the decision is that they are not the persons contemplated by Congress in section 6 of the act of 1884, although in view of the words "every Chinese person" in that section they are considered to be within the letter of the statutes. The gist of the decision is shown by the following passage:

> Chinese women are not teachers, students, or merchants, and therefore they can not as such obtain the certificate necessary to show they belong to the favored class, but as the wives and children of "teachers, students, and merchants" they do in fact

belong to such class, and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact.

It is respectfully submitted that the answer to this is that though the proof of the relation may be plenary evidence of the belonging in fact to the permitted class, it it is not the evidence which the statute plainly requires of every Chinese person. The relation will prove quite enough if it proves the status; it should not be accepted also in lieu of the statutory requirements. There is nothing in the law to prevent a certificate being issued to a person as the wife or child of a teacher, student, or merchant. The opinion proceeds:

> It is impossible to believe that parties to this treaty [the treaty of 1880] which permits the servants of a merchant to accompany him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children.

As we have before pointed out, we do not contend against the natural right under the treaty of the petitioners in this case, but against the construction by which, under the general language of the treaty, the earlier enactment is allowed to override and ignore the plain provisions of the later law, and the wife and children of a merchant held to be entitled to enter with him or after him, as well as his body and household servants, without

the prescribed certificate. We respectfully submit and insist that all such accompanying or following members of his household must produce the certificate which the law exacts. Judge Deady, conceding that the case *in re Tung Yeong* (19 Fed. Rep., 184), is not authority on the question whether the words "every Chinese person" in section 6 of the act are limited to teachers, students, and merchants, and did not include their wives and children, because said decision was made before the act of July 5, 1884, was passed, holds that it is authority in favor of the rights of the wife and children of a Chinese merchant under the treaty of 1880. So it is, but in relation to a right theretofore general, and modified, restrained, and regulated by the subsequent statute and treaty requirements.

In this opinion, upon which the court below in the case at bar chiefly relies, the hardship of such cases as referred to by Justice Field, *supra*, again comes forward both in the portion of Judge Hoffman's opinion in the *Tung Yeong* case quoted, and in the following concluding passage of Judge Deady:

> My conclusion is that under the treaty and statute, taken together, a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him and have with him his wife and children. The company of one and the care and custody of the other are his by natural right, and he ought not to be deprived of either unless the intention of Congress to do so is clear and unmistakable.

In re Wo Tai Li (48 Fed. Rep., 668), was the case of a wife of a Chinese actor who was held by the district

court for the northern district of California upon her application to enter the United States without producing the certificate required by section 6 of the act of 1884 not to be entitled to show her right to land by other evidence, because the meaning of the act is obvious. It is that the certificate is required to be produced by all Chinese persons other than laborers claiming the right to enter this country, and such certificate is to be the sole evidence of their right to land. Unless, therefore, the whole section is to be disregarded and the obvious intention of Congress frustrated, the certificate must in all cases be exacted."

The court below here also thought that the court had failed to consider the question as to the right of Chinese persons not laborers having a domicile in the United States to bring their wives and minor children, because there was nothing in the report of the case cited to show that the husband was domiciled in this country. But the language of Judge Hoffman's opinion is properly universal and exclusive, in accordance with the Government contention, namely, that, irrespective of the status of the husband as a laborer possessing a right to return, or as a merchant, and irrespective of the acquired domicile of the husband in either case, a wife and child on original entry must produce the certificate.

This was the conclusion in *In re Li Foon* (80 Fed. Rep., 881), which was disapproved by Judge Hanford in the case at bar. Li Foon was the infant son (that is, about 12 years old) of a Chinese merchant lawfully residing here, and on the authority of the cases which we

have just reviewed and of the case of *Wan Shing* v. *United States* (140 U. S., 424), the petitioner, who had never obtained a certificate, and therefore could not produce one, was denied admission.

In *In re Lee Yee Sing* (85 Fed. Rep., 635) Judge Hanford states that he adheres to the opinion rendered in the case at bar, namely, that the wives and minor children of Chinese merchants lawfully domiciled and engaged in trade in the United States are not laborers, and not, within the intent of the acts of Congress, excluded from entering and dwelling with their husbands and fathers within the United States. But he does not in that case pursue the question to the same conclusion, viz, that such wives and children may enter without the certificate prescribed by the act of 1884.

(*d*) *Executive opinions and rulings.*

As to executive rulings upon the question, these have followed the decisions of the courts denying admission (see Op. Sol. Treas., July 26, 1890; Syn. Dec. 17445; Op. Atty. Gen., Nov. 3, 1898); and although by the opinion of the Solicitor of the Treasury of September 7, 1895, which, as was expressly stated therein, is not to be taken as a precedent, a boy 12 years old, the son of a resident Chinese merchant, was allowed to enter without a certificate, opinions of the same officer of March 19, 1896, October 1, 1896, and August 3, 1898, hold the contrary. The above rulings, so far as unpublished or not yet published, will be found in an appendix to this brief.

(*e*) *The general purpose of the exclusion laws: strict construction necessary.*

The question may now be considered briefly with reference to the general purpose and bearing of Chinese legislation. It rests, as has been determined by the court, upon the sovereign and absolute right of the Government to exclude or expel aliens; and while treaty stipulations involving the plighted faith or solemn obligations of the Government are not lightly to be disregarded, it is clearly held that the determination of the question whether existing conditions and the national well-being and necessities demand the abrogation of treaty stipulations has been fully committed to Congress, and that the later expression of the legislative will is the significant one, even if it overrides previous treaty obligations.

The provisions of the Chinese exclusion laws are *strictí juris*. To bring an applicant within the allowance or protection conceded to enter or remain in the country, the conditions of the right must be exactly pursued. It is not necessary to contend in this case for what seems to be the proper theory of the Chinese exclusion laws, viz, that although the prohibition of the entry of laborers only was originally, and is still more particularly, aimed at, nevertheless the fact is that only those who are expressly permitted are entitled to admission, rather than that only those who are expressly forbidden are excluded. The language of section 6 of the act of July 5, 1884, is plainly mandatory, and in accordance with the rule as to mandatory provisions and such views as the foregoing it has been held in the administration of the law that the

omission of any of the statutory requirements from a certificate is a fatal defect, and that the treaty of 1894 does not waive any of the requirements of section 6 of the act of 1884 as to the certificates of merchants and others of the exempt classes. (See *United States* v. *Yong Yew*, 83 Fed. Rep., 832; 21 Op., 6; Id., 68; Op. July 15, 1898.) Although the later treaty, being the later law, may modify the requirements of previous legislation in some respects (21 Op., 347), we maintain that it could not be contended that because the language of the treaty respecting the certificate of the exempt classes is not in form mandatory, but merely permissive, therefore the requirements of the act of 1884 are so far modified that substantial compliance therewith is sufficient. This principle embraces not only the underlying right of those whose calling is allied to the exempt classes, but who are not themselves of the exempt classes, and such an omission as the failure of a certificate to state the "nature, character, and estimated value of the business" of a merchant applicant, but also affects the question of the production of a certificate, as well as the exact form and character of a certificate if produced.

Before proceeding to review and apply the decisions of the Supreme Court, so far as they relate to the present question, the inquiry may be again stated and defined in the following language: Is the status of a wife and her relation to her husband, when he has become duly domiciled here and is not therefore required to produce a certificate on his return to the country after a temporary absence, to be taken as extending such exemption to her, so that upon the original entry of the wife of such a

Chinese merchant she would not be required to produce a certificate, but merely to submit evidence as to her identity and valid relation to her husband sufficient to satisfy the collector of customs under the act of August 18, 1894? Answering the question again—conceding that a fundamental natural right exists under the language of the treaties by which, in view of the relationship to the husband and father, a valid wife and legitimate minor children or children of tender years may be admitted to this country, it very clearly appears that the right in all cases must be established by the rule or measure of evidence laid down by section 6 of the act of 1884, viz, by the certificate therein required. There is no valid distinction between the case of the wife of a Chinese merchant accompanying her husband to this country upon his original entry here, and that of the wife of such merchant already domiciled here and entitled to remain in this country, who subsequently follows her husband and seeks to join him here, and for that purpose to enter the country for the first time. The wife in the present case appears to have accompanied her husband upon his return, but in both cases a certificate for the wife is requisite; that is to say, the status of a valid wife and her relation to her husband fairly embracing her with him in the permitted classes, if she is not in fact a laborer, does not extend so far as to confer upon her an immunity from the certificate requirement to which the husband is entitled because of his having acquired a domicile here. The wife is a distinct Chinese individual, and since all Chinese persons of the privileged classes must produce upon their original entry into this country

the prescribed certificate (authorities cited *ante;* also *Wan Shing* v. *United States,* 140 U. S., 424, 428), the wife of a merchant must in any case produce that certificate upon her original entry here. (Op. Atty. Gen. of Nov. 3, 1898, *vide* appendix.)

(*f*) *The Supreme Court decisions.*

The case of *Chew Heong* v. *United States,* (112 U. S., 536), decided that the laborer's certificate required by section 4 of the act of May 6, 1882, as amended by the act of July 5, 1884, prescribed as the "only evidence permissible to establish his right of reentry" into the United States, is not applicable to Chinese laborers who resided in this country at the date of the treaty of 1880, departed by sea before the date of the act of 1882, and remained out of the United States until after the date of the act of 1884; the view of the court being that especially where the good faith of the Government is concerned, the repeal of a law by the implications of a later statute are not favored, and that the intention of the legislature by the act of 1884 to withdraw from Chinese laborers who resided here at the date of the treaty rights which they had acquired under it, by exacting upon their reentry conditions which it was impossible to perform, was not so clear and positive as to give to the statute a retrospective operation, the conclusion of the court being stated in the following language on page 560:

> A Chinese laborer to whom a certificate was issued under the original act is entitled to reenter only upon producing that certificate; one to whom a certificate

was issued under the act of 1884 is entitled to reenter only upon producing such certificate; while the plaintiff in error, having left before any certificate was permitted to be issued, can not be required to produce one before reentering, because, having resided here on the 17th day of November, 1880, he was clearly entitled under the express words of the treaty to go from and return to the United States of his own free will, a privilege that would be destroyed if its enjoyment depended upon a condition impossible to be performed. * * * Thus the legislation of Congress and the stipulations of the treaty may stand together.

This opinion refers to laborers only, but it supports the view that certificates are generally necessary by reason of the very fact that an exception was found which consideration of the law as a whole was held to include and justify.

Mr. Justice Field dissented in this case mainly upon the grounds that the treaty conferred no such unrestricted right as was claimed in the case and applied only to laborers who resided here at the date of the treaty and continued their residence here until the date of the act; that, conceding the sanctity of the public faith and the constant endeavor of the courts to bring legislation into harmony with treaty stipulations, if the legislature sees fit to refuse compliance with the stipulations of a treaty or to abrogate them entirely, it should be presumed that good and sufficient reasons controlled and justified its conduct; that, the act being the later expression of the sovereign will, which may enforce, modify, or repeal a treaty, its plain purport was to exclude all Chinese laborers except those who came at certain designated

periods and continued their residence in the country, and if they should leave and be desirous of returning to require them to obtain a proper certificate of identification. Justice Bradley concurred with Justice Field in this dissent, stating that if their view of the law makes it conflict with the treaty the rule is now settled that Congress may by law overrule a treaty stipulation. The dissenting opinions show even more strongly the positive and strict character of the certificate requirements.

In *United States* v. *Jung Ah Lung* (124 U. S., 621) the applicant, also a Chinese laborer, had resided in this country on November 17, 1880, and until October 24, 1883, and then left for China, taking with him the certificate required by the original act of 1882, which was stolen from him in China. The court held that under the principle determined in the Chew Heong case the applicant could not be required to present a certificate upon his reentry containing the additional particulars required by the amendment of the act of 1884 to the fourth section of the act of 1882, and that since the act of 1882 does not require that the certificate shall be the only evidence permissible to establish the right of reentry, secondary evidence of its contents from the custom-house records of the port of departure might be received. In this case Mr. Justice Harlan, with whom concurred Mr. Justice Field and Mr. Justice Lamar, dissented (it is to be noted that Mr. Justice Harlan delivered the opinion of the majority of the court in the Chew Heong case), on the ground that since the act of 1882 required the production of a certificate for reentry and the applicant had left the United States, taking such

certificate, he could not return unless he produced it at the time he sought to reenter. The new provision in the act of 1884 that certificates would be the only evidence permissible to establish the right of reentry is considered in the dissenting opinion not to declare a new rule, but to indicate in language clearer than that previously used the intention of Congress in passing the act of 1882; that the appellee's certificate was forcibly taken from him by a band of pirates is his misfortune, but the fact ought not to defeat what was manifestly the intention of the legislative branch of the Government, which was to suspend the coming of all Chinese laborers to this country for a term of years unless such laborer previously here and returning produces to the collector the certificate issued to him. Here, again, we contend that the effect of this decision as well as of the dissenting opinion is to vindicate the demand for the appropriate certificate.

The *Chinese Exclusion Case* (*Chae Chan Ping* v. *United States*, 130 U. S., 581) established the right of the Government, notwithstanding treaty stipulations, to exclude aliens, and found the act of October 1, 1888 (25 Stat., 504), excluding Chinese laborers from the United States, to be a constitutional exercise of legislative power, which, so far as it conflicted with existing treaties between the United States and China, operated to that extent to abrogate the treaties as part of the municipal law of the United States. The subject of this decision was a Chinese laborer who held a return certificate issued under the act of 1884. The certificate conferred no right upon the applicant to return to the United States

of which he could not be deprived by a subsequent act of Congress. There was no dissenting opinion in this case.

In *Wan Shing* v. *United States* (140 U. S., 424) the applicant, who was excluded as a laborer, claimed that he was a merchant, and the opinion of the court shows that his right to land resting upon proof of the fact that he was a merchant could only have been shown by a certificate of identity issued under the authority of the Chinese Government. The concluding paragraph of the opinion states broadly the rule respecting certificates in the following terms (p. 428):

> The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or of such other foreign Government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that Government to enter the United States, which certificate is to be viséd by a representative of the Government of the United States.

It is not necessary to contend in this case, as heretofore indicated, that the phrase in this paragraph "all other persons of that race" should be construed as if it read "all other persons of that race who are entitled to enter." The Government, in its administration of these laws in cases dependent upon that phrase, contends that

such is the necessary meaning, and consequently that not all Chinese persons other than laborers may come into this country upon the production of the certificate, but that all Chinese persons other than laborers who are permitted by the law to enter the country may do so upon producing the required certificate. This contention is not, however, involved in the case before the court.

Then came the *Lau Ow Bew* case (144 U. S., 47), which determined that section 6 of the act of July 5, 1884, requiring the return certificate does not apply to Chinese merchants already domiciled in the United States who, having left the country for temporary purposes, *animo revertendi*, seek to reenter it on their return to their business and their homes. The ground of the decision regarding such a merchant is shown by the following extract (pp. 60–61, 63):

> But the phraseology of the section * * * involves the exaction of the unreasonable and absurd condition of a foreign Government certifying to the United States facts in regard to the place of abode and the business of persons residing in this country, which the foreign Government can not be assumed to know, and the means of information regarding which exist here, *unless it be construed to mean that Congress intended that the certificate should be procured only by Chinese residing in China or some other foreign country and about to come for the first time into the United States for travel or business or to take up their residence.* * * *
>
> We are of opinion that it was not intended that commercial domicil should be forfeited by temporary absence at the domicil of origin, nor that resident merchants should be subjected to loss of rights

> guaranteed by treaty if they failed to produce from the domicil of origin that evidence which residence in the domicil of choice may have rendered it difficult, if not impossible, to obtain.

One of the concluding sentences, pointing out the distinction which the court found between the *Wan Shing* case and the *Lau Ow Bew* case, shows that the latter, adjudged especially in view of the acquired domiciliary rights, may not be considered to rule the present case, viz:

> All the circumstances rendered it possible for him [Wan Shing] to procure and produce the specified certificate, and required him to do so. We have no doubt of the correctness of the judgment then rendered and the reasons given in its support.

Here there was nothing to render it impracticable or even difficult for the applicants to procure and produce the specified certificate.

The next case, that of *Fong Yue Ting* v. *United States* (149 U. S., 698), reviewed elaborately the legislation and the previous decisions, and determined that section 6 of the act of May 5, 1892, which act among other things provided for and required certificates of residence of Chinese laborers within the limits of the United States who were at the time of the passage of the act entitled to remain in the United States, was constitutional and valid, and that the right to expel aliens or any class of aliens absolutely or upon certain conditions in war or in peace, like the right to exclude them established by the previous cases, is an inherent and inalienable right of every sovereign and independent nation. The dissenting opinions in the case of the Chief

Justice, Mr. Justice Field, and Mr. Justice Brewer proceeded upon the theory that the persons affected, having acquired a lawful residence in the United States, were within the protection of the Constitution and secured by its guarantees, and that the act in question deprived them of liberty and imposed punishment without due process of law and in disregard of the constitutional guarantees. The import of the dissenting views is that the right to expel is not so broad and unqualified as the right to exclude.

In *Lem Moon Sing* v. *United States* (158 U. S., 538) it appeared that the applicant was a merchant who left this country for a temporary visit to his native land with the intention of returning and continuing his residence and business in the United States, and returned here after the act of August 18, 1894 (28 Stat., 372), was passed, which provided that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." Upon his return he submitted to the collector, not a certificate, but credible testimony regarding his status here as a merchant, which, since he was a returning merchant, presumably would have entitled him to admission but for the act of 1894 referred to. The point adjudged was (the court declining to express any opinion upon the question whether the applicant was entitled of right

under some law or treaty to reenter the United States) in accordance with the clear determinations of previous decisions, that where a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted; and that, when Congress declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers from admission to the United States under any law or treaty, such decision should be final unless reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers is taken away. In this case Mr. Justice Brewer dissented.

In *Wong Wing* v. *United States* (163 U. S., 228) the provision of law before the court was the fourth section of the act of May 5, 1892, by which it was enacted that any Chinese person convicted of being unlawfully in the United States shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States. The contention of the appellant was that this summary proceeding, inflicting an infamous punishment, was in conflict with the constitutional amendments which required indictment and public trial by an impartial jury. The court, after reviewing the question of the validity of the various acts in the light of the previous decisions, said (pp. 236–7:

> Our views upon the question thus specifically pressed upon our attention may be briefly expressed

> thus: We regard it as settled by our previous decisions that the United States can as matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree and causing their deportation upon executive or subordinate officials. But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

Mr. Justice Field concurred in the result in this case, though dissenting from some of the views expressed by counsel in argument.

We have thus reviewed these cases in order to show what we think is fully established by the decisions of the court, namely, that the Chinese exclusion laws are on the whole valid and constitutional; that they rest upon undoubted government powers; that they are to be strictly and even rigorously construed; and that, as to the certificate provisions, no such exception as is here contended for may successfully be based upon the judgments of the court. The exceptions relative to Chinese laborers have disappeared through the passage of time and because all Chinese laborers are now excluded under the act of 1888, although certain registered Chinese laborers, resident in this country and entitled to remain, may now

temporarily revisit China and return to this country under the second article of the convention of December 8, 1894, upon the production of the certificate therein provided. Therefore, the only exception to the necessity for producing a certificate which the decisions of the court justify is that found in the special case of those who are in the situation of Lau Ow Bew. Every other Chinese person who is entitled at all to come into this country is certainly required under the language of the law and the force of the decisions to produce the certificate specified in section 6 of the act of 1884 (or, being a privileged laborer, the return laborer's certificate of the Treaty of 1894), and no amount or form of argument can relieve the appellees in this case from that necessity.

The case of the *United States* v. *Wong Kim Ark* (169 U. S., 649), in which a child born in the United States of Chinese parents having a permanent domicile and residence here, although subjects of the Emperor of China, was held to be by the fact of his birth a citizen of the United States, presents an analogy to the rule and exception as to certificates, for just as that opinion affirmed as universal under the common law the ancient and fundamental rule of citizenship by birth within the territory, with three clearly defined exceptions, so the plain effect and weight of the decisions on the subject now before the court is to show that the certificate requirement is universal, with a single surviving exception in the case of a merchant duly domiciled here who is returning to the country after a temporary absence.

(*g*) *The alleged hardship and impracticability of complying with the law.*

As to the hardship of such cases and the impracticability of observing the requirements of the law respecting certificates, which plainly affected the court below in this case and Judge Deady in the *Chung Toy Ho* case—even if there is real hardship, that may not determine the construction of the law; and there is, of course, no such impracticability or incongruity as was found in the *Lau Ow Bew* case, because the stress of that decision rested upon the absurdity of requiring the Chinese Government to certify to facts dependent upon a *returning* Chinese merchant's rights under his domicil of choice and business established here, as to which this Government only could properly certify. There is, of course, nothing in that decision to relieve a merchant coming here for the first time who has neglected to obtain and produce a certificate; and the impracticability seen in the present case is not at all similar to that in the case of a returning merchant, and could not relieve the woman and children coming here for the first time, for the simple reason that they are Chinese persons, and are not to be endowed so far with the status of the husband and father as to grant them an exemption attaching to him in his individual character, of which he alone might have availed if he were reentering the country after a temporary absence. The impracticability, therefore, in this case resolves itself into the greater or less degree of hardship which will flow from exacting the certificate.

It may be that, consistently with the law as administered under the Treasury regulations, the applicants may remain here subject to bond to supply the lacking certificates or depart within a given time. This would not even involve hardship, and no reason is perceived to doubt that the vital statistics and emigration records in China will permit of the certificate being obtained now from the Government there and visé'd by our consular authorities *nunc pro tunc* without the applicants being compelled to return to China to obtain it. If there are certain features of the certificate which presuppose the presence of the person permitted to come to this country at the place where and time when the certificate is issued in China, as, for instance, such as may be found in the phrase in section 6, "who shall be about to come to the United States," or the phrase "and shall show such permission and the name of the permitted person in his or her proper signature," these features would not necessarily appear to be of so vital a character that they might not be waived or substantially supplied under the peculiar circumstances of this case consistently with a strict construction of the law. In the same way, if it would be improper to permit the applicants to remain here under the stipulations of a bond, they may withdraw temporarily to adjacent foreign territory pending the receipt of the certificate. This would involve some inconvenience, but would hardly constitute hardship. Further, a trip back to China for the purpose of obtaining the certificate would involve serious inconvenience and possibly some hardship, but that course is not impracticable.

At all events, inasmuch as all the parties interested in this proceeding have had due notice of the Government claim and of the possible result thereof, so that, in view of the claim being determined adversely to the applicants, the business interests of the respective husbands and fathers may be settled and disposed of, would it be especially onerous for all the members of the separate families to withdraw to some other country or to return to China, and thus preserve the family relation? This was suggested by Mr. Justice Field in the *Ah Moy case*, *supra* (21 Fed. Rep., 785, 786): "And they need not now be separated. He can return with and protect his child wife in the Celestial Empire." It is always to be remembered that the wife and children came here in the face of the law forbidding their coming without the required certificate. If, therefore, no means for supplying the defect in their case can be found without return to China, with the alternative of abandoning the domicil here, then it is the fault, not of our laws, but of the applicants themselves that they now find themselves in a dilemma which entails expense, inconvenience, and hardship, and which may interrupt for a time their domestic relations.

(*h*) *Conclusion.*

In conclusion, therefore, we contend that however broad the fundamental right of the applicants may be as created by or recognized by the treaty stipulations, the laws require a certificate under the rule that an act constitutes as full an expression of the legislative will as a

treaty, and that the later expression of this will must prevail; that the treaty right has been so far modified that it must be exercised in accordance with the terms of the statute—that is, by the production of a certificate by every such Chinese person who is permitted to enter the United States; that the judgment of the court below is therefore erroneous and should be reversed, and that the judgment of the United States commissioner so far as ordering the defendants to be deported to China should be reinstated and the applicants be remanded to the custody of the United States marshal for the execution of the writ of deportation.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF THE TREASURY,
Washington, D. C., July 26, 1890.

SIR: I have considered the question presented by the Rev. Frederic J. Masters, superintendent of the Chinese mission, Methodist-Episcopal Church, at San Francisco, relative to the proposed landing of the wife of Dr. Langdon, a Chinese dentist, now residing in said city.

It appears from the superintendent's letter that Dr. Langdon is a subject of China, and married his wife in that country a few years ago. The collector of the port has refused to permit her to land without the certificate required by law showing that she belongs to the privileged class of immigrants.

The superintendent argues, "That it is unreasonable to expect the Chinese officials to furnish her with a certificate of her being the wife of a dentist who is doing business only in this country. The proof," he continues, "is to be found here rather than there;" and he suggests that the lady should be admitted upon Dr. Langdon furnishing proof of the marriage. This is merely an argument *ab inconvenienti*, and can not countervail the requirements of the statute.

The difficulty lies in the fact that Dr. Langdon is not a naturalized citizen of the United States, but is an alien temporarily residing here. If he were a citizen himself, the *status* of his wife, if she were capable of naturalization, would be obvious. Section 1994, Revised Statutes,

provides that, "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

But under the laws regulating immigration from China neither Dr. Langdon nor his wife is eligible to citizenship in the United States. Their marital relation does not except her from the requirements of the statute.

I am, therefore, constrained to hold, with the collector, that under the act of July 5, 1884 (23 Stat., p. 115), the application must be denied.

The letter referred to is herewith returned.

Very respectfully,

W. P. HEPBURN,
Solicitor.

HON. SECRETARY OF THE TREASURY.

DEPARTMENT OF JUSTICE,
Washington, D. C., November 3, 1898.

The SECRETARY OF THE TREASURY.

SIR: I have the honor to acknowledge the receipt of your communication of October 31, in which you inform me that since the 1st of October, 1896, customs officers have been instructed, in accordance with Syn. Dec. 17445, to require the certificate prescribed by section 6 of the act of July 5, 1884, relating to the exclusion of Chinese, to be presented by all applicants for admission to this country without reference to sex or age, and that under my opinion of July 15 last such officers have been instructed that only such Chinese persons as are specifically enumerated, viz, officials, teachers, merchants, or travelers for curiosity or pleasure, shall be allowed admission upon presentation of the prescribed certificate. You state that the wife of Lee Yuen, a Chinese merchant resident at Rochester, N. Y., for ten years or more, has applied

for admission to this country, but has not produced a certificate from the Government of China, from which country she comes directly to the United States, and you refer to credible testimony submitted as to the meritorious standing of Lee Yuen as a merchant of the city named. On these facts you submit for my decision the question whether or not, under the circumstances, the woman should be allowed to join her husband.

In my opinion referred to, considering the right to admission of Chinese persons known as traders under a certain form of certificate, I reached the conclusion that a trader, not being expressly known to the laws as among the exempt classes and not being properly included therein as a merchant, is not entitled to admission into the United States even upon a certificate framed in accordance with section 6 of the act of 1884. The broad result may be drawn from this opinion that no Chinese person not connected with the diplomatic service is entitled to admission into this country unless embraced in the classification marked out by the phrase "officials, teachers, students, merchants, or travelers for curiosity or pleasure." We have now to consder whether the wife of a Chinese merchant is properly to be excepted from this absolute exclusion.

In the case of *Tung Yeong* (19 Fed. Rep., 184) the court considered, under the treaty of 1880 and the act of 1882, the right of entry of certain Chinese children of tender years, and found there was no requirement of law which would necessitate the denial to the parent of the custody of his child and the sending of the latter back to the country from which he came. The treaty of 1880, by article 2, accorded to Chinese subjects when proceeding to the United States as teachers, students, merchants, or travelers, together with their body and household servants, all the rights, privileges, immunities, and exemptions which are accorded to the subjects and citizens

of the most-favored nation. Section 6 of the act of May 6, 1882, as amended by the act of 1884, required from "every Chinese person other than a laborer who may be entitled by said treaty [the treaty of 1880] or this act to come within the United States" a certificate of permission and identification from the Chinese Government or from the other foreign government of which at the time such Chinese person shall be a subject; and this amended section provided for the contents of such certificate and made the same the sole evidence permissible on the part of an applicant for admission to establish a right of entry into the United States.

In the case of *Ah Quan* (21 Fed. Rep., 182, 186) it was held that the wife or minor child of a man of the Chinese race other than a laborer, entitled to come to the United States, is a Chinese person entitled under the law to enter this country upon the production of the required certificate, but not otherwise, in view of the provisions of the amendatory act requiring a certificate, the court being satisfied that these provisions embraced every Chinese individual.

In the case of the *Chinese Wife* (21 Fed. Rep., 785), affecting the wife, coming to this country for the first time, of a laborer returning under the laws then in force, Justice Field held that, although the status of the wife is not necessarily that of her husband, and she is therefore to be regarded as other than a laborer, she is, however, a distinct person, and must furnish the certificate required; while Judge Sawyer thought that the status of the wife follows and partakes of that of the husband as one of his class, and that the wife was therefore to be excluded absolutely as a laborer.

In the case of *Chung Toy Ho et al.* (42 Fed. Rep., 398) Judge Deady held that the wife and children of a Chinese merchant, who was entitled under article 2 of the treaty of 1880 and section 6 of the act of 1884 to come within and dwell within the United States, are

entitled to come into the country with him or after him as such wife and children without the certificate prescribed in said section 6, the court considering that the domicile of the wife and children is to be taken as that of the father, and concluded, therefore, that though they are not expressly mentioned in the treaty the act of 1884 does not limit or restrict the privileges conceded by the treaty, but only adds a rule or measure of evidence by which they may be conclusively established. The learned judge further considers that the father is entitled to the company of his wife and the care and custody of his children by natural right, and ought not to be deprived of them unless the intention of Congress to the contrary is clear and unmistakable.

The cases of *Wo Tai Li* (48 Fed. Rep., 668) and *Li Foon* (80 Fed. Rep., 881) follow the earlier decisions exacting a certificate from all Chinese persons of the permitted classes, while the case of *United States* v. *Gue Lim* (83 Fed. Rep., 138) follows Judge Deady's decision in the case of Chung Toy Ho.

In *United States* v. *Lee Yee Sing*, (85 Fed. Rep., 635) the court adheres to the opinion rendered in the case of Mrs. Gue Lim, but sustains the exclusion by the collector of customs of a minor child of a Chinese merchant domiciled in this country, on the ground that paragraph 6 of the act of August 18, 1894 (2 Supp. R. S., 253), makes the decision of the appropriate Government officer excluding an alien from admission into the United States final unless reversed on appeal to the Secretary of the Treasury.

In most of the foregoing cases it appears that the husband or father had duly acquired a commercial domicile in this country.

In the case of *Lau Ow Bew* v. *United States* (144 U. S., 47, 63) it was held that a Chinese merchant having a commercial domicile here may leave the country for temporary purposes and return without the production on

his reentry of the certificate required by the act of 1884, and that the certificate is only required to be produced by Chinese persons of the exempted classes upon their original entry into the United States for travel, business, or to take up their residence.

The inquiry, then, in many cases, including the case before us, is this: Is the status of the wife and her relation to her husband when he has become duly domiciled here, and is not therefore required to produce a certificate upon his return to the country after a temporary absence, to be taken as extending such exemption to her, so that upon the original entry of the wife of such a Chinese merchant she would not be required to produce a certificate, but merely to submit evidence as to her identity and valid relation to her husband, sufficient to satisfy the collector of customs under the act of August 18, 1894?

Conceding that a fundamental natural right exists under the language of the treaties of 1880 and 1894, by which, in view of the relationship to the husband and father, a valid wife and legitimate minor children or children of tender years may be admitted to this country, I am clearly of opinion that this right in all cases must be established by the rule or measure of evidence laid down by section 6 of the act of 1884, namely, by the certificate therein required. I can perceive no valid distinction between the case of the wife of a Chinese merchant accompanying her husband to this country upon his original entry here and that of the wife of such a merchant already domiciled here and entitled to remain in this country, who subsequently follows her husband and seeks to join him here and for that purpose to enter the country for the first time. In both cases a certificate for the wife is requisite.

The status of a valid wife and her relation to her husband fairly embracing her with him in the permitted classes if she is not in fact a laborer does not extend so far as to confer upon her an immunity from the certificate

requirement to which the husband is entitled because of his having acquired a domicile here. The wife is a distinct Chinese individual, and, since all Chinese persons of the privileged classes must produce upon their original entry into this country the prescribed certificate (authorities cited *ante;* see also *Wan Shing* v. *United States*, 140 U. S., 424, 428), the wife of a merchant must in any case produce that certificate upon her original entry here.

I therefore answer your question by stating that the Chinese woman in this case, Mrs. Lee Yuen, should not be allowed to join her husband and remain in this country without the production of the proper certificate from the Government of China.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF THE TREASURY,
Washington, D. C., September 7, 1895.

Hon. J. G. CARLISLE,
Secretary of the Treasury.

SIR: I have considered the correspondence submitted by Acting Secretary Hamlin, with regard to the importation of a Chinese boy named Tom Ah Bat, son of Tom Kwaie, a domiciled merchant of the city of Omaha, Nebr.

It appears that permission was at one time given for the landing of this boy, upon the understanding that he was then 8 years old. But this it seems was an error, and it being represented to the collector that he is now 14 years old that officer states that he should not be landed, for the reason that he is old enough to come in direct competition with white laborers. It is stated by Mr. Parke Godwin, in his letter to the Secretary, that

the object of the father in bringing his son to this country was for the purpose of having him educated in the American schools of Omaha. It appears, moreover, that at the time the controversy with regard to the landing of Tom Ah Bat *began he was only about 12 years old.*

The collector very prudently argues that "a Chinese boy who has arrived at the age of 14 is as old as a white boy of the age of 20 or 21," and that Chinese children who arrive at the age of 14 no longer require parental care and never attend our schools when they reach that age. He further believes that if his views should be overruled in this case and the fact should become known, it would greatly stimulate the introduction of Chinese children into this country.

It is not the fault of the boy, and probably not that of the father, that the importation and landing of his son has been postponed until he has arrived at the age of 14. Besides, I am unwilling to concur with the collector that a Chinese boy of 14 years is equal to an American boy of 20 or 21.

Under the peculiar facts in this case, and not intending to make it a precedent for the future, I am of the opinion that Tom Ah Bat, upon being properly identified, should be landed.

The correspondence referred is herewith returned.

Very respectfully,

F. A. REEVE, *Solicitor.*

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF THE TREASURY,
Washington, D. C., March 19, 1896.

Hon. J. G. CARLISLE,
Secretary of the Treasury.

SIR: I have considered the question presented by Assistant Secretary Hamlin, with regard to the landing of

the Chinese boy, Lum Sear, who applied for admission at the port of Portland, Oreg., on the 29th ultimo.

From the statement of facts made by the collector, the father of the boy, Dot Jack, has been for many years a reputable merchant of Portland, and that his son, Lum Sear, born in China, has never before been in the United States, and is now 20 years of age.

I am of the opinion that the young man can only be landed in accordance with the provisions of section 6 of the act of July 5, 1884.

The papers submitted are herewith returned.

Very respectfully,

F. A. REEVE,
Solicitor.

DEPARTMENT OF JUSTICE,
OFFICE OF SOLICITOR OF THE TREASURY,
Washington, D. C., October 1, 1896.

Hon. JOHN G. CARLISLE,
Secretary of the Treasury.

SIR: The Hon. W. E. Curtis, Acting Secretary of the Treasury, incloses for my consideration a letter dated the 26th ultimo, from the United States attorney at New York, in relation to the action of the Department in authorizing the admission of Chinese children under 16 years of age, to join their parents, domiciled in this country as merchants. An expression of my opinion upon the points suggested by the United States attorney is requested.

The United States attorney suggests that in certain summary proceedings pending in his district against Chinese persons for being in the United States unlawfully, by reason of entry without the requisite evidence, several of the defendants attempted to show that they

were boys under the age of 16, born in China, and never before in this country, but preparing to join their fathers who have been living here some time as merchants. He further states that no such certificate as is provided for by section 6 of the act of 1884, or by article 3 of the treaty with China, proclaimed December 8, 1894, was produced by the boys.

I infer that the United States attorney is somewhat embarrassed by the rulings of the Department referred to in paragraphs 17, 18, 19, 20, and 21 of Synopses of Rulings and Decisions, relating to the Chinese exclusion acts (1896).

Section 6 of the act of July 5, 1884, prescribes, that in order to the faithful performance of the provisions of the act, *every* Chinese person, other than a laborer, who may be entitled to come within the United States, and who shall be about to come into the United States, shall obtain the permission of, and be identified as so entitled by the Chinese Government, or such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and which shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall show the individual, family, and tribal name in full, title, or official rank, if any; the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by said act to come within the United States.

In re Ah Quan, Judge Sawyer held, that the wife, or minor child, of a man of the Chinese race entitled to come to the United States, other than a Chinese laborer, is a "Chinese person," within the meaning of the original and amendatory restriction acts, and entitled to enter

upon the production of the required certificate, but not otherwise, under the provisions of the statutes. (21 Fed. Rep., 182; see also p. 785.)

In re Chung Toy Ho and Wong Choy Sin, Judge Deady held that the wife and children of a Chinese merchant, who is entitled, under article 2 of the treaty of 1880, and section 6 of the act of 1884, to come within and dwell in the United States, are entitled to come into the country with him, or after him, without the certificate prescribed by section 6. (42 Fed. Rep., 398.)

In re Wo Tai Li, Judge Hoffman held, in the case of the wife of a Chinese actor, that a Chinese person who fails to produce the certificate required by section 6 of the act of 1884, can not establish a right to enter by any other evidence. (48 Fed. Rep., 668.)

In re Wan Shing v. *The United States* (140 U. S., 424), the Supreme Court held, that "The result of the legislation respecting the Chinese would seem to be this, that no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or of such other foreign Government as they may at the time be subjects of, showing that they are not laborers and have the permission of that Government to enter the United States, which certificate is to be viséed by a representative of the Government of the United States."

The courts have not been uniform in the strict construction of the Chinese exclusion acts. In some instances motives of humanity have possibly been persuasive on the side of a liberal construction. But, strictly, the statute makes no express exceptions in favor of children. "All other persons of that race," says Mr. Justice Field,

in the Wan Shing case, "except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese Government, or such other foreign Government as they may at the time be subjects of."

It will be observed that one of the conditions precedent to entering the United States *is the consent of the immigrant's own government*, to be evidenced by a certificate. There is no apparent reason why this condition should not apply to a subject who is a minor, as well as to a subject who has reached lawful age. In fact, it might apply more strongly in the case of a minor.

I am, therefore, but reluctantly, inclined to the opinion that section 6 of the act of 1884 applies to Chinese children under 16 years of age whose parents are domiciled in this country as merchants.

The papers submitted are herewith returned.

Very respectfully,

F. A. REEVE,
Solicitor.

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., August 3, 1898.

Hon. L. J. GAGE,
Secretary of the Treasury.

SIR: Assistant Secretary Howell has referred for my consideration certain papers relating to appeals from the decision of the collector in refusing the landing of the Chinese children. They are:

* * * * *

Second. Petition and appeal of Soon Cow.
Third. Petition and appeal of Fung Tsoy.

* * * * *

Soon Cow is a Chinese boy, born in China, and between 7 and 8 years old. His parents were both born in China. His father is a merchant in this country. His mother died soon after giving birth to this son.

Fung Tsoy, who is 10 years of age, was born in China. His father is a Chinese merchant domiciled in the United States, and his mother is dead.

* * * * *

With regard to the other Chinese children, the question is one which has been repeatedly, and diversely, decided by the courts, and has been frequently the subject of consideration by this office, namely, whether the minor children of Chinese parents domiciled in this country as merchants can be landed without the production of the certificate prescribed by section 6 of the act of July 5, 1884.

Without referring more particularly to the various Federal decisions on the subject which have already been cited and discussed in the opinions of this office, I would refer to the opinion of my predecessor, dated October 1, 1896 (Syn. 17445), and the opinion I had the honor to communicate on the 21st of July last, holding in harmony with what was considered the preponderance of judicial authority, that the minor children of Chinese merchants domiciled in this country could only be admitted upon the production of the certificate required by section 6 of the act of July 5, 1884, relating to the exclusion of Chinese. I would therefore advise you that I adhere to said ruling. See also the last paragraph of the opinion of Judge Hanford, in *Lee Yee Sing* (85 Fed. Rep., 635).

* * * * *

Very respectfully,

MAURICE D. O'CONNELL,
Solicitor.